IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1315 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHREEJI COLOUR CHEM INDUSTRIES - Petitioner(s)

Versus

UNION OF INDIA THR' MINISTRY OF FINANCE & 1 - Respondent(s)

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Appearance :
MR HASIT DILIP DAVE for Petitioner(s) : 1,
MR JITENDRA MALKAN, ASST. SG, for Respondent(s) : 1-2
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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 03/03/2006

ORAL JUDGMENT (Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

RULE. Service of rule is waived by Shri Jitendra

Malkan, Asst. Solicitor General, for the respondents. At the request of the learned advocates, the petition is finally heard today.

2. The circumstances giving rise to the present petition, in a nutshell, are as under:

2.1 The petitioner had submitted several applications under the provisions of sec. 173L of the Central Excise Rules (hereinafter referred to as 'the Rules')to the Asst. Commissioner, Central Excise and Customs, Div. IV, Vadodara, for refund of Rs. 2,50,494.31. The said applications had been rejected by the said officer under his order dated 2.7.1991.

2.2 Being aggrieved by the aforesaid order, the petitioner had preferred an appeal before the Commissioner (Appeals), Mumbai, who remanded the matter for de novo consideration to the Asst. Commissioner. After hearing the petitioner, the Asst. Commissioner of Central Excise & Customs, Div. IV, Vadodara again rejected the applications and, therefore, the petitioner again preferred an appeal before the Commissioner (Appeals). The said appeal was also dismissed by an

order dated 31.8.98. Being aggrieved by the aforesaid order, the petitioner preferred an appeal before the CEGAT, Mumbai, and the said appeal had been allowed by an order dated 25.11.2003. By virtue of the said order passed by the Tribunal, the orders passed by the Asst. Commissioner, Central Excise & Customs dated 21.5.96 and confirmed by the Commissioner (Appeals), Mumbai, dated 31.8.1998 had been quashed and set aside and the Tribunal had directed that the amount of refund claimed by the petitioner under the provisions of Rule 173L of the Rules should be paid to the appellant without any delay.

3. The petitioner has approached this court with a prayer that the respondent authorities be directed to pay the petitioner interest @ 18% on the amount of refund with effect from 10.1.1990 till the date of payment of the said amount of refund because once the Tribunal had quashed and set aside the order of the Asst. Commissioner, Central Excise & Customs, and had directed the respondent authorities to pay the amount of refund, by virtue of the provisions of sec. 11BB of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'), the respondent authorities ought to have paid interest on the said amount from the date on which the said section

was enacted till the date on which the amount of refund had been paid. As the applications for refund had been submitted in 1990 and the provisions of sec. 11BB had been enacted later in point of time, learned advocate Shri Dave appearing for the petitioner has fairly submitted that the amount of interest under the provisions of sec. 11BB would become payable to the petitioner only from the date on which the said section had come into force but interest on the said amount be paid from 10.1.1990 till the day when sec. 11BB of the Act had been enacted on the basis of the judgment delivered by the Hon'ble Supreme Court in the case of **Sandvik Asia Ltd. v. CIT & Ors**., (2006) 280 ITR 643.

4. He has also submitted that the petitioner has a right to get interest as there was delay in payment of the refund, which was lawfully due to the petitioner and which had been wrongfully withheld by the respondent authorities. He has also relied upon the judgment delivered in the case of Asst. Commissioner v. J.K. Cement Works, 2005 (179) ELT A150 so as to strengthen his case.

5. On the other hand, learned Asst. Solicitor General

Shri Malkan appearing for the respondent authorities has vehemently opposed grant of any prayer in favour of the petitioner only on the ground that while challenging the order passed by the Asst. Commissioner, Central Excise & Customs, as well as the Commissioner (Appeals) before the Tribunal, though the petitioner had prayed for interest on the amount of refund, the Tribunal had allowed the appeal and had directed the respondent authorities to pay only the amount of refund and the Tribunal had kept silence on the prayer made for interest and, therefore, it should be presumed that the Tribunal never wanted any amount of interest to be paid to the petitioner. According to him, as the said prayer had not been expressly granted by the Tribunal, the petitioner is not entitled to any amount of interest and as the refund has already been paid on 27.8.2004, the petition should be dismissed.

6. So as to substantiate his case, learned Asst. Solicitor General has relied upon the judgment delivered in the case of **Padmanabh Silk Mills v. Union of India**, 2006 (193) ELT 536 (Guj.)

7. We have heard the learned advocates at length and

have also considered the judgments cited by them.

8. Upon hearing the learned advocates and looking to the provisions of sec. 11BB of the Act, in our opinion, the petitioner cannot be deprived of the interest on the amount of refund, which he is entitled to.

9. It is not in dispute that the amount of refund has been paid after the order of the Tribunal had been passed, but no amount of interest has been paid thereon. It is also not in dispute that the petitioner was entitled to refund of duty, which it paid earlier. The applications for refund submitted by the petitioner, though had been initially rejected, were finally granted by the Tribunal as it came to the conclusion that the petitioner was entitled to the refund of duty which it had paid. Now, the question remains with regard to payment of interest on the amount of duty which had been retained by the respondent authorities, which they had no right to retain for such a long period.

10. So as to compensate an assessee, whose money has been retained by the respondent authorities, provisions of sec. 11BB of the Act have been enacted in the Act.

The purpose with which the said section has been enacted is to see that the assessee is duly compensated because, the amount of duty, though was not payable, had been paid by the assessee and which was retained by the respondent authority for a long period and as a result, the assessee had suffered loss. So as to compensate the loss, interest is to be paid under the provisions of sec. 11BB of the Act. It is pertinent to note that it is not necessary to make any application for getting interest on the amount of refund in view of the provisions of sec. 11BB of the Act. In our opinion, even if the petitioner had not prayed for interest, the petitioner had a statutory right to get interest as per the provisions of sec. 11BB of the Act. Thus, the submission of the learned Asst. Solicitor General, that the prayer for interest had not been granted by the Tribunal, would not help him.

11. So far as the period for which the amount of interest should be paid to the petitioner is concerned, the learned Asst. Solicitor General has submitted that the amount of interest, even if payable, cannot be paid for the period prior to the date on which the Tribunal decided the appeal in favour of the petitioner. It has

been submitted by him that the Tribunal had decided the appeal on 18th Nov. 2003 and the order had been issued on 25th Nov. 2003. He has submitted that interest, even if payable, can be paid from the date commencing from 3 months from the date on which the Tribunal decided the appeal and not three months from the date on which the Asst. Commissioner, Central Excise & Customs, had rejected the applications for refund. He has relied upon the judgment in the case of **Padmanabh Silk Mills** (supra) to substantiate his point.

12. We are not in agreement with the submission made by the learned Asst. Solicitor General in this regard. Explanation to section 11BB of the Act reads as under:

> ***Explanation***:- Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any court against an order of the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate tribunal or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.

Looking to the aforesaid explanation, the order which had been passed by the Tribunal should be treated as if it had been passed under sec. 11B(2) of the Act. In the instant case, the Asst. Commissioner, Central Excise &

Customs, as well as the Commissioner (Appeals) had rejected the applications submitted by the petitioner for refund. The Tribunal came to the conclusion that rejection of the applications was improper and the petitioner was entitled to the refund of duty paid by it and the said order of the Tribunal has attained finality. This would clearly denote that the Tribunal found the order of the two lower authorities incorrect and, therefore, the petitioner had a right to receive the refund right from the day on which it had submitted its applications to the Asst. Commissioner for refund. This position has been clarified by the aforesaid explanation given to sec. 11BB of the Act and by virtue of which the order passed by the Tribunal shall be deemed to be an order passed under sec. 11B(2) of the Act. Thus, it would be presumed that the Tribunal was the authority which had passed the first order and, therefore, the petitioner had a right to get the amount of refund within three months from 21.5.1996, the date on which the Asst. Commissioner, Central Excise & Customs, rejected all the applications for refund submitted by the petitioner.

13. If one looks at the judgment relied upon by the learned Asst. Solicitor General in the case of **Padmanabh**

Silk Mills (supra), the said judgment deals with amount of interest on the refund of pre-deposit. In the said case, this court was concerned with refund of deposit, and the prayer made by the petitioner in that case was not granted. In the instant case, we are concerned with the refund of duty and not deposit and, therefore, in our opinion, the said judgment would not help the respondent. On the contrary, the judgment relied upon by Shri Malkan helps the petitioner. In para 12 of the said judgment, it has been stated as under:

> "In our considered opinion, the provision of Section 35F of the Central Excise Act, 1944 are meant totally for a different purpose. It is only with a view to see that frivolous Appeals are not entertained, therefore, the order of pre-deposit of duty demanded or penalty levied is passed by the Appellate Authority while granting conditional stay. In the instant case also the petitioners cannot claim interest on refund. Interest on refund can be awarded only under the provision of Section 11BB of the Act when there is a delay on the part of the Authority even after the order of refund was passed otherwise not."

The above observation clearly reveals that where there is a question with regard to delay on the part of the authority in respect of refund of duty, the provisions of sec. 11BB of the Act would apply and the assessee will have a right to get interest on the amount of refund which has been paid at a belated stage.

14. It may be noted here that the said judgment had been

delivered on 7.10.2004 and thereafter trade notice has been issued by the department to the effect that even when the deposit is to be returned to the assessee, interest should be paid thereon. A Trade Notice dated 8.12.2004 had been issued because in many cases even while returning the amount of deposit, delay was being caused by the authorities. Para 5 of the said notice clearly denotes that delay beyond the period of 3 months should be viewed adversely and appropriate disciplinary action should be initiated against the concerned defaulting officers. It further warns that all concerned officers that default entails an interest liability and if such liability occurs by reason of any order of CESTAT or a court, such orders should be complied with and the amount of interest should be recovered from the concerned officer.

15. In our opinion, the aforestated view of the respondent authorities is absolutely justified because, on account of default committed by an officer of the government, the state exchequer should not suffer.

16. The observations made in the judgment cited by learned advocate Shri Dave in the case of Sandvik Asia Ltd. (supra) clearly denote that when the authorities

wrongfully retain a lawfully due amount to any assessee, the assessee is entitled to interest. The said principle has been duly incorporated in provisions of sec. 11BB and, therefore, we need not further elaborate the same. Moreover in the case of **J.K. Cement Works** (supra), the Hon'ble Supreme Court has confirmed the order passed by the Rajasthan High Court and dismissed the SLP filed by the State upholding the decision of the Rajasthan High Court to the effect that interest under the provisions of sec. 11BB of the Act has to be paid from the date on which the said section has been enacted, in accordance with law.

17. For the reasons stated hereinabove, we allow the petition. Prayer made in the petition with regard to payment of interest is granted to the effect that the petitioner should be paid interest as per the provisions of sec. 11BB of the Act. For the period prior to the date on which the said section has been enacted, the petitioner should be awarded interest @ 9% p.a. i.e. for period commencing from three months from 21.5.1996 till section 11BB was enacted, the petitioner should be awarded interest @ 9% p.a. The amount of interest should be calculated and paid to the petitioner within one month from the date of receipt of this order by the respondent

authorities. We further direct that if there is a further delay in payment of interest, a sum of Rs. 5,000/- should be awarded to the petitioner for the delay cased for every month or part thereof and the said amount shall be recovered from the officer found to be responsible for the delay.

Rule is made absolute.

At this stage, learned Asst. Solicitor General Shri Malkan has prayed for stay of the operation of this order for two weeks to enable him to approach the higher forum. The request is rejected.

(Anil R. Dave, J.)

(K.A. Puj, J.)

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